Supreme Court, U.S.
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No. 03-761

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on March 1, 2004, and (2) granting the petition or, alternatively, staying a decision on the petition until disposition of the anticipated petition for a writ of certiorari in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *rehearing denied*, 2004 WL 396975 (5th Cir. Feb. 27, 2004). The petition is timely filed pursuant to Rule 44.2.

Petitioner asserts as grounds for this motion the following:

1. **Six additional judges on the U.S. Court of Appeals for the Fifth Circuit have recently expressly acknowledged the circuit split that was the basis for the petition for writ of certiorari.**

On Friday, February 27, 2004—the very day that this Court considered the petition for writ of certiorari in this case—the Fifth Circuit released its decision denying a petition for rehearing and rehearing en banc in *GDF Realty* that had been pending for nearly a year. Particularly significant is the lengthy opinion by Circuit Judge Edith Jones—joined by Circuit Judges Grady Jolly, Jerry Smith, Harold DeMoss, Edith Brown Clement, and Charles Pickering—dissenting from the denial of the petition for rehearing en banc.

In her opinion, Judge Jones and five other judges explicitly referenced the circuit split that has developed between the reasoning of the Fifth Circuit in the *GDF Realty* case and the D.C. Circuit in the *Rancho Viejo* case that is the subject of this petition.

They state that in the *GDF Realty* panel decision, the Fifth Circuit "panel correctly determined, *unlike other courts,* that the 'regulated activity' under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land." Pet. App. 5a. (first emphasis added). The reference to "other courts" that had reached the opposite

conclusion is expressly to the *Rancho Viejo* case, which found, as noted by Judge Jones, "that the regulated activity was not the ESA take but rather the 'construction of a commercial housing development.'" Pet. App. 6a. (citing *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003)).

Judge Jones' opinion explains that the Fifth Circuit panel's constitutionally-mandated analysis—that the Commerce Clause analysis must center on the actual Cave Species take rather than the peripheral planned commercial development—is at odds with the Fifth Circuit's conclusion. The result (which would likewise occur if the D.C. Circuit's constitutionally-impermissible and conflicting analysis were employed) is "constitutionally limitless" and "a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." Pet. App. 3a.

Taken together, a majority of the active judges on the Fifth Circuit—the 3 panel judges, plus the six judges joining Judge Jones' opinion dissenting from the denial of the en banc rehearing petition—has adopted reasoning of fundamental constitutional significance which is in direct conflict with the D.C. Circuit's in *Rancho Viejo*, and has expressly acknowledged the split between the circuits with respect to this critical reasoning.

The explicitly-acknowledged circuit split is an "intervening circumstanc[e] of a substantial ... effect" that warrants rehearing under Rule 44.2. *Cf. Clark v. Manufacturers Trust Co.*, 338 U.S. 241 (1949); *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34 n. (1929) (noting in both cases that the petition for rehearing and previously-denied petition for certiorari were granted because of intervening development of a circuit split).

2. Judge Jones' opinion has highlighted the inconsistency between the D.C. Circuit's decision below and this Court's decisions in *Lopez*, *Morrison*, and *SWANCC*.

Judge Jones' opinion dissenting from the denial of the petition for rehearing en banc in the *GDF Realty* case also highlights how fundamentally—despite their contradictory reasoning—the decisions in both *GDF Realty* and *Rancho Viejo* are at odds with the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook County. v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001). The Fifth Circuit "panel's 'interdependent web' analysis of the Endangered Species Act," she wrote, "gives ... subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." Pet. App. 3a. Judge Jones properly concluded that "the panel's commerce clause analysis is in error," and later that the panel's broad interpretation of the aggregation principle "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.* at 3a, 6a. *See also id.* at 12a n.6 (noting that the panel's decision is also "contrary" to *SWANCC*).

As Rancho Viejo noted in its certiorari petition, the same conflict exists here between the decisions of this Court cited by Judge Jones and the D.C. Circuit's decision below. Rehearing is therefore warranted to consider the inconsistency between the D.C. Circuit's decision below and the controlling precedent of this Court, in light of the now broader acknowledgement of that inconsistency presented by Judge Jones' opinion.

3. A petition for writ of certiorari in *GDF Realty* will soon be presented to this Court.

Counsel for GDF Realty has advised the undersigned counsel that GDF Realty intends to file a petition for a writ

of certiorari in that case. Pet. App. 14a. The *GDF Realty* case involves the identical issues that were raised by Rancho Viejo in the present case. Rehearing is thereby warranted pending resolution of the petition for certiorari in *GDF Realty*. *See, e.g., Pickett v. Union Terminal Co.*, 314 U.S. 704 (1941) (granting petition for rehearing and previously-denied petition for certiorari in order to consolidate with case addressing same issue); *Bowden v. Fort Smith*, 315 U.S. 793 (1942) (same); *Helvering v. Sprouse*, 316 U.S. 656 (1942) (same); *see also Forgett v. United States*, 390 U.S. 203 (1968) (granting petition for rehearing, vacating order denying certiorari, then granting petition for certiorari, vacating lower court decision and remanding for further consideration in light of intervening decision); *Simmons v. Sea-Land Services, Inc.*, 462 U.S. 1114 (1983) (same); *Florida v. Rodriguez*, 461 U.S. 940 (1983) (same). Indeed, in *United States v. Ohio Power Co.*, 351 U.S. 980 (1956), this Court sua sponte vacated a prior order denying a petition for rehearing and withheld judgment on the petition for rehearing so that the case might be disposed of consistently with two companion cases in which certiorari had been granted six months after the petition for rehearing had initially been denied. After the companion cases were decided, this Court then granted the petition for rehearing in *Ohio Power*, vacated the earlier order denying certiorari, granted the petition for certiorari, and reversed the judgment of the lower court in order to reconcile the outcome in the case with the decisions subsequently rendered by the Court. *Id.*, 353 U.S. 98 (1957).

The denial of certiorari should therefore be reconsidered so that this case can be heard—or at least held, *see Forgett v. United States*, 390 U.S. 203 (1968); *Ohio Power*, 351 U.S. at 980—and resolved simultaneously with the *GDF Realty* case.

CONCLUSION

For the reasons stated above, the petition for rehearing should be granted, the decision entered March 1, 2004 denying the petition for writ of certiorari should be vacated, and the petition for writ of certiorari should be granted or, alternatively, held pending resolution of the forthcoming petition for writ of certiorari in *GDF Realty*.

Respectfully submitted,

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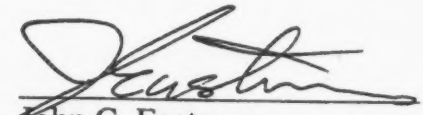
DATED: March 25, 2004

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



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